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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 280.

HENRY HERRMAN, CHARLES STERNBACH, AND ABRAHAM HERRMAN, PLAINTIFFS IN ERROR,

vs.

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 17, 1890.

(14,319.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 22, 1893.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

[Seal of U. S. Circuit Court, South. Dist. New York.]

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Henry Herrman, Charles Sternbach, and Abraham Herrman, plaintiffs, and William H. Robertson, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and ninety, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 15th day of July, in the year of our Lord one thousand eight hundred and ninety.

JOHN A. SHIELDS, *Clerk.*

The foregoing writ is hereby allowed.

ADDISON BROWN, *U. S. D. J.*

2 [Endorsed:] E. & A. A. 923. 8288. U. S. Supreme Court. Henry Herrman *et al.*, plaintiffs in error, against William H. Robertson, defendant in error. Writ of error. Stanley, Clarke & Smith, attorneys for plaintiffs in error. Due service of a copy of the within writ of error is hereby admitted this 15th day of July, 1890. Edward Mitchell, U. S. att'y, attorney for defendant in error. S.

[File-mark:] U. S. circuit court. Filed Jul. 15, 1890. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 3 to 28, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Henry

Herrman, Charles Sternbach, and Abraham Herrman, plaintiffs in error, against William H. Robertson, defendant in error, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 19th day of August, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

JOHN A. SHIELDS, *Clerk.*

3 Superior Court of the City of New York.

HENRY HERRMAN, CHARLES STERNBACK, and ABRAHAM HERRMAN, Plaintiffs, *against* WILLIAM H. ROBERTSON, Defendant. } Summons No. 9.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, Dec. 2*d*, 1882.

STANLEY, CLARK & SMITH,
Plaintiff's Attorneys; Offices, No. 160 Broadway, New York City.

4 [Endorsed:] No. 9. 8288. N. Y. superior court. Henry Herrman & o'rs, plaintiffs, against William H. Robertson, defendant. Summons. Stanley, Clark & Smith, plaintiffs' attorneys, 160 Broadway, New York city. Due service hereof admitted this — day of ——, 18—. Received, U. S. attorney's office, Dec. 22, 1882. Dec. 2, 1882. C. S. T.

5 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We, for certain reasons, being desirous that our circuit [L. S.] court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against William H. Robertson, defendant, by Henry Harrman & *al.*, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 10th day of January, 1883, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 5th day of January, in the year one thousand eight hundred and eighty-three.

JOSEPH M. DEUEL, *Clerk.*

STEWART L. WOODFORD,
United States Attorney, Attorney for Defendant.

6 [Endorsed:] 8288. U. S. circuit court. Henry Harrman & *al. vs.* William H. Robertson. Copy certiorari. Steward L. Woodford, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, January 5, 1883. Yours, Steward L. Woodford, U. S. attorney, attorney for defendant. To S., C. & S., plaintiffs' attorneys. Due service of a copy of the within and of the above notice is hereby admitted. New York, January 5th, 1883. Stanley, Clarke & Smith, plaintiffs' attorneys.

7 Circuit Court of the United States for the Southern District of New York.

HARRY HERRMAN, CHARLES STERNBACH, and ABRAHAM HERRMAN, Plaintiffs,
against
WILLIAM H. ROBERTSON, Defendant. } Complaint.

Plaintiffs complain—

1st. That defendant was during the times hereinafter named collector of customs of the United States at the port of New York.

2nd. That plaintiffs were during said times partners in trade under the firm name of H. Herrman, Sternbach & Co., and as such duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3rd. The defendant, as such collector, exacted from plaintiffs, as and for duties thereon, viz., seventeen thousand three hundred and ninety-eight and $\frac{45}{100}$ dollars.

4th. That by the laws of the United States the true duty upon said goods was seven thousand six hundred and thirty and $\frac{45}{100}$ dollars, but plaintiffs, in order to obtain said goods, were compelled to pay the sum of nine thousand seven hundred and sixty-six dollars, in gold coin of the United States, in excess of the amount required by law.

8 5th. That plaintiffs filed with said defendant due and timely protests in writing upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto and also as above stated.

6th. That plaintiffs made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals when this action was commenced.

7th. That the bill of particulars, hereto annexed, states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury, and of his decision thereon together with the other particulars required by law, and is made a part hereof.

8th. That said sum so exacted as aforesaid has never been repaid to plaintiffs and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for nine thousand seven hundred and sixty-six dollars in United States gold coin, with interest on the several sums named in the bill of particulars from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

STANLEY, CLARKE & SMITH,
Attorneys for Plaintiffs.

9 Endorsed: 8288. United States circuit court. Henry Herrman & o'rs against William H. Robertson. Complaint. To S. L. Woodford, Esq., att'y for def't. Stanley, Clarke & Smith, pl'ffs' attorneys, 160 Broadway, New York city. U. S. attorney's office. Received Jan. 11, 1888.

Name of importer (for all the importations), H. Herrman, Sternbach & Co.

	Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duties illegally exacted.	Date of payment of duties in error.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
				1881.	1881.		1882.	1881.	1881.	1882.
1	M'f's of hair & cotton	Liverpool.	Celtic	Oct. 18	Oct. 31	346 45	Sept. 6	Dec. 8	Dec. 8	Jan. 29.
2	Do.	Do.	Alaska	" 27	Nov. 10	637 50	" 20	" 20	" 20	Feb'y 8.
3	Do.	Do.	Germanic	Nov. 8	" 21	650 05	" 22	" 20	" 20	" 8.
4	Do.	Do.	City of Chester	Oct. 11	Oct. 29	1,263 60	Oct. 29	Nov. 17	Nov. 17	No ans. rec'd. 1882.
5	Do.	Do.	Adriatic	" 29	Nov. 11	2,356 00	Nov. 8	Dec. 20	Dec. 20	Feb'y 8.
6	Do.	Do.	Gallia	Nov. 10	" 25	179 60	" 20	" 21	" 21	No ans. rec'd. 1882.
7	Do.	Do.	Arizona	" 17	Dec. 2	985 10	" 29	" 31	" 31	Ap'l 3.
8	Do.	Do.	Wisconsin	Sept. 18	Sept. 29	728 20	Sept. 26	Oct. 18 1882.	Oct. 18 1882.	No ans. rec'd.
9	Do.	Do.	Do.	Aug. 11	Aug. 24	2,621 50	Aug. 21	Aug. 21	Aug. 21	Do.

11 [Endorsed:] 8288. U. S. circuit court, southern district of New York. Henry Herrman & ano. against William H. Robertson. (9.) Bill of particulars. New York, Jan. 11, 1883. To S. L. Woodford, Esquire, defendant's attorney. Sir: Please to take notice that this action is brought to recover duties illegally exacted by the defendant, as collector of customs at the port of New York, and the within is the plaintiffs' bill of particulars. Stanley, Clarke & Smith, plaintiffs' attorneys, 160 Broadway. ————, defendant's attorney. Received, U. S. attorney's office, Jan. 11, 1883.

12 United States Circuit Court, Southern District of New York.

HENRY HERRMAN & *al.*
versus.
W. H. ROBERTSON, Collector, etc.

The answer of the defendant herein, by Stewart L. Woodford, his attorney, to the complaint of the plaintiffs in the above-entitled action.

I. He admits he was at the times in said complaint mentioned collector of the port of New York, and in such official capacity received payment from the plaintiffs for and on account of duties due to the United States under the laws thereof upon certain importations of merchandise, imported by said plaintiffs into the port of New York from foreign countries.

II. He alleges that any and all moneys received by him from plaintiffs at the times in said complaint mentioned were paid by said plaintiffs as a debt due by them to the United States, and not otherwise, and were received by defendant by virtue of his office as said collector and under the direction of the Secretary of the Treasury and for and on account of the United States, and were forthwith thereafter, and before the commencement of this action or the service of any protest, paid into the Treasury of the United States, and that the amount of said moneys so received from plaintiffs were the amounts due from them to the United States, according to the rate of duty imposed by law upon the several articles of merchandise by them imported and assessed with the duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiff's import entry thereof were collected or received by defendant from the plaintiffs.

III. And defendant, further answering, denies that he has at this time sufficient information to form a belief as to the precise description of the merchandise contained in the several packages referred to in the said complaint, by the marks and numbers and description there given, except in so far as to state and defendant, herein answering, doth aver and state, that said merchandise was not dutiable according to the laws of the United States at the rates specified in the complaint.

IV. And defendant, further answering, admits that plaintiffs filed with defendant certain protests, but he denies that he has sufficient information to form a belief as to whether upon the importations in question protests and appeals were made by the plaintiffs conformable to the laws of the United States, and defendant leaves plaintiffs to make such proof thereof as they may be advised.

V. And as to any other allegations in said complaint contained not hereinbefore fully answered or admitted, defendant denies the same and each thereof and leaves the plaintiffs to make such proof thereof as they may be advised.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEWART L. WOODFORD,
United States Attorney, Attorney for Defendant.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York. }

W. H. Robertson, being duly sworn, says that he is the defendant above named, and that the foregoing answer is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Sworn to before me this — day of ——, 188–.

——— ———,
Notary Public, New York County.

13 [Endorsed:] 8288. U. S. circuit court, southern district of New York. H. Herrman & *al. vs.* W. H. Robertson, collector, etc. Answer. Stewart L. Woodford, United States attorney, attorney for defendant. Due service of a copy of the within answer is hereby admitted. New York, January 13, 1883. Stanley, Clark & Smith, plaintiffs' attorneys. To S., C. & S., plaintiffs' attorneys.

14 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the eleventh day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable E. Henry Lacombe, circuit judge.

HENRY HERRMAN *et al.*
vs. } N. S. 8288.
WILLIAM H. ROBERTSON.

Now come the plaintiffs, by Stephen G. Clarke, Esq., their attorney, and move the trial of this cause; likewise comes the defendant, by William Wickham Smith, Esq., assistant U. S. attorney, his attorney.

Thereupon a jury is empannelled and the cause proceeds to trial.

After hearing the evidence for the plaintiffs, and on motion of the attorney for the defendant, the jury, on December 12, 1889, by direction of the court, say that they find a verdict for the defendant, and so they say all.

On motion of Mr. Clarke, for the plaintiffs, ordered that the plaintiffs have a stay of sixty days in which to make and serve a case, with leave to turn the same into a bill of exceptions.

An abstract of the minutes.

[L. S.] JOHN A. SHIELDS, *Clerk.*

15 United States Circuit Court, Southern District of New York.

HENRY HERRMAN *et al.*
vs. } Judgment.
WILLIAM H. ROBERTSON.

JULY 15, 1890.

The issues in this action having been brought on for trial before Mr. Judge Lacombe and a jury, at a circuit court of the October

term, 188-, and the issues having been tried, and a verdict for the defendant having been duly rendered on the 12th day of Dec., 1889, and his costs having been adjusted at $18.85:

Now, on motion of Edward Mitchell, United States attorney, for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $18.85, his taxed costs, and have execution therefor.

Judgment signed this 15 day of July, 1890.

JOHN A. SHIELDS, *Clerk.*

16 [Endorsed:] N. S. 8288. United States circuit court. Henry Herrman *vs.* William H. Robertson. Judgment-roll. Edward Mitchell, United States attorney, attorney for defendant. Filed ——— —, 188-. Costs, $———. U. S. circuit court. Filed Jul 15, 1890, 12.45 p. m. John A. Shields, clerk.

17 U. S. Circuit Court, Southern District of New York.

HENRY HERRMAN, CHARLES STERNBACH, and ABRAHAM HERRMAN
vs.
WILLIAM H. ROBERTSON. } N. S. 8288.

Plaintiffs' Bill of Exceptions.

This cause came on for trial on the 11th day of December, 1889, before the Honorable E. Henry Lacombe, circuit judge, and a jury duly empanelled to try same.

This action was brought to recover the difference in duty between 35% ad valorem and various higher rates of duty assessed and paid upon certain goods imported by plaintiffs at the port of New York in the year 1881.

Duties were paid to defendant under protest as follows: Against defendant's liquidation claiming "The goods in question are
18 liquidated by you as being liable to a duty of 50 cents per pound and 35 per cent. ad val.

We claim the goods are composed of hair and cotton only, and as such should pay a duty of 35 per cent. ad val. as a non-enumerated article under the second half of section 2499, R. S., being the highest rate of duty which any of the component material pays."

Plaintiffs thereafter, in due time, appealed and brought this suit.

Further to maintain the issues on their part, plaintiffs introduced samples of the goods in question and evidence tending to show from an analysis their component material to be calf hair and cotton exclusively. Among other evidence on this point a report as to these samples from Prof. Torrey, an expert witness was verified by him, and on this point was as follows:

"The sample marked 'C 386' by the Republic August 12, 1887, found to contain 87.4 calf hair and 12.6 cotton by weight.

The next sample, '292,' Arizona, Aug. 20, 1887, 86.6 calf
19 hair and 13.4 cotton.

Sample 760, Alaska, Dec., 1887, 88.5 calf hair and 11.5 cotton.

H. T. 2680, 85.6 calf hair and 14.4 cotton.

H. T. 2759, 86.1 calf hair and 13.9 cotton.

The above samples were all composed of calf hair and cotton, with no admixture of wool that could be detected by the aid of the microscope.

(Signed H. G. Torrey, Government examiner of textile fabrics.)"

There was no admixture of wool in the goods.

It further appeared that the goods in question were a low grade of calf-hair goods. It further appeared that they cost less than forty cents per pound, the foreign value per running yard being from one shilling and ten pence to two pence.

Plaintiffs having rested, counsel for defendant, without introducing any evidence, moved the court to direct a verdict for the defendant; which motion was granted, and the counsel for the
20 plaintiffs then and there duly excepted, and the exception was allowed.

And inasmuch as the foregoing matters of law and fact do not otherwise appear upon the records of the trial, the judge before whom the cause was tried has, upon the request of the plaintiffs, by their attorneys, Stanley, Clarke & Smith, settled and signed the foregoing as and for the plaintiffs' bill of exceptions herein as of the 12th day of December, 1889.

E. HENRY LACOMBE.

Endorsed: N. S. 8288. U. S. circuit court, southern district of New York. Henry Harman *et al. vs.* William H. Robertson. Plaintiffs' bill of exceptions. Stanley, Clark and Smith, attorneys for plaintiffs, 120 Broadway, N. Y. city. Consented to. S. G. Clarke, of counsel. Edward Mitchell, U. S. att'y and att'y for def't. U. S. circuit court. Filed July 1, 1890. John A. Shields, clerk.

21 Supreme Court of the United States.

HENRY HERRMAN, CHARLES STERNBACH, and Abraham Herrman, Plaintiffs in Error, *vs.* WILLIAM H. ROBERTSON, Defendant in Error.	Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiffs in error, by Stanley, Clarke & Smith, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit: That by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendant.

And the said plaintiffs pray that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing,

and that they, the said plaintiffs, may be restored to all things which they have lost by occasion of said judgment, &c.

STANLEY, CLARKE & SMITH,
Attorneys for Pl'ffs in Error.

22 [Endorsed:] 8288. United States Supreme Court. Henry Herrman *et al.*, plaintiffs in error, *vs.* William H. Robertson, defendant in error. Assignment of error. Stanley, Clarke & Smith, attorneys for plaintiffs in error. Due service of a copy of the within assignment of error is hereby admitted this 16th day of July, 1890. Edward Mitchell, U. S. att'y, attorney for def't in error. To Edward Mitchell, U. S. att'y, attorney for def't in error. U. S. circuit court. Filed July 16, 1890. John A. Shields, clerk.

23 Supreme Court of the United States.

HENRY HERRMAN & *al.*, Plaintiffs in Error.
vs.
WILLIAM H. ROBERTSON, Defendant in Error. } Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Edward Mitchell, his attorney, comes here into court and says that there is no error, either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

EDWARD MITCHELL,
U. S. Att'y, Attorney for Defendant in Error.
S.

24 [Endorsed:] 8288. United States Supreme Court. Henry Herrman & *al.*, plaintiffs in error, *vs.* William H. Robertson, defendant in error. Joinder in error. Edward Mitchell, U. S. att'y, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 18 day of July, 1890. Stanley, Clarke & Smith, attorneys for plaintiffs in error. To S., C. & S., attorneys for plaintiffs in error. U. S. circuit court. Filed July 18, 1890. John A. Shields, clerk.

25 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

HENRY HERRMAN, CHARLES STERNBACH, and ABRAHAM HERRMAN
vs.
WILLIAM H. ROBERTSON. } Bond for Damages and Costs.

Know all men by these presents that we, James Wilkinson, 43 West 53d St., N. Y. city, & Daniel McKeever, 54 West 88th St., N. Y.

city, are held and firmly bound unto the above-named William H. Robertson in the sum of two hundred and fifty dollars, to be paid to the said William H. Robertson; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 10th day of July, in the year of our Lord one thousand eight hundred and ninety.

Whereas the above-named plaintiffs in error have prosecuted their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAS. WILKINSON. [L. S.]
DANIEL McKEEVER. [L. S.]

Sealed and delivered and taken and acknowledged this 11th day of July, 1890, before me—

L. GOTTHOLD.

26 [Endorsed:] 8288. U. S. circuit court, southern district of New York. Henry Herrman *et al. vs.* William H. Robertson. Bond for costs on writ of error. Approved as to form, amount, and sufficiency of sureties. N. Y., July 15, 1890. Addison Brown, U. S. D. J. U. S. circuit court. Filed July 15, 1890. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

James Wilkinson and Daniel McKeever, being duly sworn, each for himself deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

DANIEL McKEEVER.
JAS. WILKINSON.

Sworn to this eleventh day of July, A. D. 1890, before me—

LEWIS GOTTHOLD,
[SEAL.] *Notary Public, N. Y. C.*

27 UNITED STATES OF AMERICA, *ss:*

To William H. Robertson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and ninety, pursuant to a writ of error filed in the clerk's office of the circuit

court of the United States for the southern district of New York, wherein Henry Herrman, Charles Sternbach, and Abraham Herrman are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated July 15th, 1890.

ADDISON BROWN, *U. S. D. J.*

28 [Endorsed:] E. & A. A. 923. 8288. U. S. Supreme Court. Henry Herrman *et al.*, plaintiffs in error, against William H. Robertson, defendant in error. Citation. Stanley, Clarke & Smith, attorneys for plaintiffs in error. Due service of a copy of the within citation is hereby admitted this 15th day of July, 1890. Edward Mitchell, U. S. att'y, attorney for defendant in error. S.

[File-mark:] U. S. circuit court. Filed Jul. 15, 1890. John A. Shields, clerk.

Endorsed on cover: Case No. 14,319. S. New York C. C. U. S. No. 280. Henry Herrman, Charles Sternbach, and Abraham Herrman, plaintiffs in error, *vs.* William H. Robertson, collector of the port of New York. Filed October 17, 1890.

Office Supreme Court U. S.
FILED.
MAR 3 1894
JAMES H. McKENNEY,
CLERK.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 280.

CHARLES STERNBACH ET AL. (Herrman, Sternbach & Co.)

vs.

WM. H. ROBERTSON.

PLAINTIFFS' BRIEF.

Statement.

In 1881, plaintiffs imported goods composed of the cheapest sort of calf-hair and cotton, and nothing else, the microscope failing to reveal a particle of wool in them; because there was none there. (Rec. 9 top.)

The foreign value ran from two pence a yard up to one and ten pence; so the cost was far below forty cents a pound. *(Ibid.)*

In *weight*, the calf-hair was upward of 80%, but by no means in *value*; though the precise relative values are not stated in Prof. Torrey's report. *(Id.* 8 bottom and 9 top.*)*.

Notwithstanding they contained *no* wool, the collector assessed these goods as '*manufactures of wool*' at

fifty cents a pound, in addition to the thirty-five per cent *ad valorem* (R. S. 2d ed. p. 471); so this cheap article was made to pay several times its value for the privilege of coming into this country.

If a calf, or cow, was a 'like animal' to an alpaca, or goat, the pound-duty upon these goods, costing less than forty cents a pound, would have been but twenty cents a pound, under the next clause of the tariff (R. S. 2d ed. p. 471-2) instead of fifty; but neither party pretended this clause had any applicability to our importations.

Against this assessment of wool duties, the plaintiffs protested;—

"We claim the goods are composed of hair and cotton only; and, as such, should pay a duty of 35% *ad val.*, as a non-enumerated article under the second half of Sec. 2499, R. S., being the highest rate of duty which any of the component materials pays." (Rec. 8, fol. 18.)

Plaintiff duly appealed to the Sec'y., and brought this suit. (*Ibid.*)

The defendant, offering no evidence, moved the Court to direct a verdict in his favor, which motion was granted, and an exception allowed to the plaintiffs. (Rec. 9; fols. 19 and 20.)

Assignment of Errors.

The plaintiffs assign for error;—

I. The granting of defendant's motion to have a verdict directed in his favor. (Rec. 9, fols. 19, 20.)

II. The verdict for defendant, rendered by such direction. (*Id.* 7, fol. 14.)

III. The judgment entered upon that verdict in favor of defendant. (*Id.* 8, top.)

Statutes.

The collector classified the goods under this provision;—

"Woolen cloths, woolen shawls, and all manufactures of wool, of every description, made wholly or in part of wool, not herein otherwise provided for, fifty cents per pound and, in addition thereto, 35%. *ad valorem.*" (R. S., 2d ed., 471.)

The importers claimed to enter the goods under these provisions;—

"Sec. 2499 . . . : on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable." (R. S., 2nd. ed. 458-9.)

"Cotton braids . . . and all other manufactures of cotton, not otherwise provided for, 35%. *ad valorem.*" (R. S., 2d. ed. 461.)

"Hair-cloth, known as 'crinoline cloth,' and all other manufactures of hair, not otherwise provided for, 30%. *ad valorem.*" (R. S., 2nd ed. 476.)

POINTS.

I.

A directed verdict can only be upheld if, upon the most favorable view of all the facts, with every inference therefrom which it would be permissible for the jury to draw, no other result is attainable.

II.

The burden of proving error in the collector's assessment is upon the protestant. Arthur v. Unkart, 96 U. S. 118. This burden we bore, and proved the defendant's assessment erroneous, by showing there was *no* wool in the goods which he classified as manufactures wholly or in part of wool. (Rec. 8, 9; fols. 18, 19.)

Then he undertook to justify the retention of the money it is proved he never ought to have taken, by asserting (we suppose—though the record does not show it) that the claim of our protest was incorrect.

If it was permissible for him to do this, yet it throws the burden of proving a defence outside the proper discharge of his own official duty upon the defendant, who alleges such defence.

The third paragraph of our complaint (Rec. 3, fol. 7) declares the collector exacted for duties upon the goods mentioned in the bill of particulars ("Mfs. of hair and cotton"; *Id.* p. 5) $17,398.47. The fourth paragraph (*Ib.*) states the true duty to be $7,630.47; while the fifth states the filing of the protest against his exaction, "setting forth distinctly and specifically the grounds of objection thereto". (*Id.* fol. 8.)

The second paragraph of the answer (Rec. p. 6) after the statement shown to be false (*Id.* 8, fols. 17, 18) that the money collected was paid into the treasury before protest, sets up this, as the real defence;—

> "That the amount of said moneys, so received from plaintiffs were the amounts due from them to the United States, *according to the rate of duty imposed by law upon the several articles* of merchandise by them imported and assessed with the duty, and *no other sums than duties regularly assessed* and ascertained and liquidated *according to law* upon the plaintiffs' import entry thereof were collected or received by the defendant from the plaintiffs". (Rec. 6, fol. 12, par. II.)

The collector assessed fifty cents a pound, in addition to the 35% *ad val.*, upon our goods. We protest and sue. His explicit defence is that the sum he took was the prescribed "*rate of duty imposed by law* upon the several articles."

The burden was thrown upon us to negative this averment; and we did it. We proved it untrue.

The *theory* is that, as a contractor, or as a litigant, the United States have only the same rights as an individual contractor or litigant; yet we conceive it to be certain that no individual suitor could set up an issue entirely outside his pleadings.

Codd v. Rathbone, 19 N. Y. 39 Md.

Our protest truly stated that the goods were composed of cotton and hair only; so did not contain wool, on account of the supposed presence of which the heavy pound duty was exacted. We gave the collector the truth as to the *facts*, which showed his exaction not to be according to law. It was sufficient to state of what the goods were composed; therefrom the true legal conclusion followed.

"The importers were bound only to state, as they did, that the duty of 60% was illegal, and why IT was illegal."

Heinze v. Arthur, 144 U. S. 34.

If, under the pleadings, it was competent for the collector to claim that our goods were really dutiable at a less rate than we asked for them—so that we could not get back money illegally exacted, because the extent of our claim was not co-terminous with that of the illegality—yet, this at least, threw upon him the burden of proving what he thus asserted.

Ross v. Fuller, 17 F. R. 224.
Kennedy v. Hartranft, 9 *Id.* 18.

As this Court must "judicially know, from its own records" (Aspen v. Billings, 150 U. S. 38 top) this subject has been repeatedly before this Court.

In Arthur v. Herrman, 96 U. S. 141, it was stated that goods of these components were dutiable, under the similitude clause, as we now claim to apply it, at the rate imposed upon manufactures of cotton, because of its ingredieney, though it was not the chief component; but, because of this latter fact it was not entitled to the ten per cent reduction given by the act of 1872. (*Ibid.* 142.)

If we rightly recollect, the transcript (which we have not at hand) will show the goods involved in that litigation to be precisely like those in the suit at bar.

In 1874, the Treasury Department promulgated a decision (88. 1908) that such goods were dutiable, under the concluding clause of the similitude section (2499) at 35% as manufactures of cotton were.

The decision of this Court and the Treasury regulation were the application of this clause of Sec. 2499 as "a rule of law which enacts that all manufactures of which cotton shall be a component part shall be deemed to be manufactures of cotton." (16 How., 162.)

In Arthur v. Fox, 108 U. S. 125, goods of cow-hair and cotton were again declared to be non-enumerated, and dutiable under section 2499;—though according to the similarity mentioned in its first clause, and not because of their composition. These were high-priced goods (*Id.* 128) resembling the enumerated articles of goat-hair and cotton, which resemblance was declared to be the controlling consideration. Herrman vs. Arthur, 127 U. S., 368 to 370, again says these cow-hair and cotton goods are not enumerated (p. 368 bottom) and reverses the Court below because it directed a verdict for defendant, without submitting the question of similitude (alleged in defence there, but *not* in the present case) to the jury. (*Id.* 370.)

What is alleged in defense here is that the assessed rate was the legal rate; which we showed not to be true.

To prove this, we produced an expert witness who had analysed the goods, and found they contained no

wool, but only cotton and hair, in stated proportions of *weight*. (Rec. 8 bottom.) Then, without any evidence as to relative *values* (which it was for defendant, upon whom our testimony had cast the burden, to show, if material to his defense) or as to the commercial designation of these goods, or mercantile understanding in relation to them, the Court directed a verdict for the defendant.

In a much more recent case, the same Judge truly observed:

> "The impression which I have formed in reading the various decisions of the Supreme Court, touching classification according to components, is that *the fundamental system of division is the* VALUE.
>
> Rosenstein, 56 Fed. Rep. 825.

Preponderance of *weight* has no tendency to establish a like (or any) preponderancy of *value*.

There was really *no* evidence to justify the arbitrary direction of a verdict; not nearly so much as in Herrman v. Arthur, 127 U. S. 363, where this Court held such direction improperly given.

Nor was it in the least justified by Arthur v. Butterfield, 125 U. S. 70, which the judge wrongly assumed to require such direction in the present case. There was *evidence* to support the result of the Butterfield suit.

That considered the great percentage of *value* as determining the character of the goods. They contained fine Angora goat-hair; were known as "*alpacas, mohairs*," etc.; "that the goat's hair of which they are composed, in part, constitutes eighty per cent. of the whole VALUE, and the cotton twenty per cent." (125 U. S. 73 top.)

The evidence then showed the nature and predominance of the hair element in "crinoline cloth" and in "hair-seating;" and it is significant, too, that, *even had the Butterfield goods been dutiable* as the collector claimed (as women's, &c., dress-goods) it would have

been on account of the "hair of the alpaca, goat," etc. they contained.

The question in that case was not at all like the present. The Butterfield goods—high-priced, dress goods—were *unquestionably* dutiable because of the hair they contained; the collector imposed the duty under the act of 1867, because they were (as he said) women's dress-goods, containing hair of the alpaca, goat, etc.; the importer replied that, though the hair in them determined the duty upon them, yet it was the duty imposed by the act of 1870, *as amended*, and not that of 1867. Whether "dress-goods," containing goat-hair etc., or not became immaterial; because, it being conceded that the hair was the controlling element, the amendatory resolution of January 30, 1870, inserting "herein," had precluded any reference to any earlier act than that of July 14, 1870, in determining the rate affixed to goods *admitted* to be dutiable as 'hair.'

EDWIN B. SMITH,
120 Broadway, New York,
Of counsel for Plffs. in error.

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CASE No. 14319.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

HENRY HERRMAN ET AL., PLAINTIFFS in error,
v.
WILLIAM H. ROBERTSON, COLLECTOR of the port of New York.
No. 280.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

This is an action to recover duties paid under protest. The goods were imported in 1881, so that the case is covered by the Revised Statutes. The case was tried before Judge Lacombe and a jury. A verdict was directed for the defendant, and the plaintiffs below assign error.

STATEMENT OF THE CASE.

"The goods in question were a low grade of calf-hair goods," costing less than 40 cents a pound. They seem to have been a fabric, and consisted by weight of 85½ to 88½ per cent calf hair and 11½ to 14½ per cent cotton. They contained no other material. The relative values of the materials do not appear.

It is not clear just what percentage was levied on these goods by the collector. The protest, as quoted in the bill of exceptions, states that the goods were liquidated at 50 cents per pound and 35 per cent ad valorem. The report of the case at 41 Federal Reporter, 881, states that they were assessed at 20 cents per pound and 35 per cent ad valorem (which would have been right under the similitude clause). The bill of exceptions itself states that they were assessed at "various" rates of duty higher than 35 per cent. It is immaterial at what precise figures the goods were assessed, but they seem to have been classified by the collector under the similitude clause of § 2499 of the Revised Statutes, applying that clause to paragraph 1163 (Heyl) of § 2504 of the Revised Statutes, the collector regarding the goods imported as similar to "manufactures * * * composed wholly or in part of worsted, the hair of the alpaca, goat, or other like animals," and therefore dutiable at 20, 30, 40, or 50 cents per pound, according to value, and in addition thereto 35 per cent ad valorem.

The importers protested against this liquidation, making the following claim:

> We claim the goods are composed of hair and cotton only, and as such should pay a duty of 35 per

> cent *ad valorem* as a nonenumerated article under the second half of section 2499, R. S., being the highest rate of duty which any of the component material pays.

It will thus be seen that both parties relied on § 2499 of the Revised Statutes. The collector based himself on the "similitude clause," reading:

> There shall be levied, collected, and paid, on each and every nonenumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title, as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned.

The importers based themselves on the last clause of the same section, reading:

> And on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable.

Cotton being chargeable at a higher rate than calf hair, the importers therefore conceded that they were bound to pay at the rate of 35 per cent *ad valorem*.

It was clear enough that the goods, if nonenumerated, came presumptively under the similitude clause at some rating. (*Arthur* v. *Fox*, 108 U. S., 125.) It was clear enough, on the other hand, that they were composed of two or more materials. The precise question raised, therefore, by the importers' protest, is which clause of § 2499 should govern when both clauses are applicable.

Prior to the trial, however, the case of *Arthur* v. *Butterfield* (125 U. S., 70) had been decided by the Supreme Court; and that case, apparently relating to goods precisely similar, held that they were dutiable at 30 per cent ad valorem as "manufactures of hair not otherwise provided for." Most of the goods in question in that suit, indeed, were imported prior to the Revised Statutes, but under provisions using the same language.

Arthur v. *Fox*, above cited, holds that the similitude clause governs the component material clause (pp. 128–9). The similitude clause is the first to be considered if the article in question is not enumerated in the tariff act. The component materials are to be inquired into only "if nothing is found to which it bears the requisite similitude;" under the doctrine of *Stuart* v. *Maxwell* (16 How., 150), "any other construction would leave the law open to evasions." The goods in question in the *Fox* case seem to have been very similar to those in the case at bar.

But in the *Butterfield* case, as above stated, the court subsequently held that they came within the definition of "manufactures of hair," and therefore are to be regarded as enumerated and excluded from the provisions of § 2499.

It was held by the trial judge in the case at bar that the goods in question were in fact "manufactures of hair," and therefore enumerated and not within either of the clauses of § 2499 of the Revised Statutes. He therefore held that the duty had been improperly assessed; that it ought to have been not only lower than the collector asked, but lower than the importers themselves claimed. The only question left in the case was the sufficiency of

the protest. This the court held to be insufficient, directing a verdict for the defendant with the following remarks:

> In disposing of this case I feel controlled by the decision in *Arthur* v. *Butterfield* (125 U. S., 70), to hold that these goods are manufactures of hair, and, as such, provided for by the clause in Schedule M, § 2504, of the Revised Statutes, under the phrase, "and all other manufactures of hair, not otherwise provided for, thirty per centum *ad valorem*.". The precise point now raised, viz, whether this grade of cattle-hair goods are manufactures of hair, does not seem to have been presented to the Supreme Court in the three earlier cases where such goods were before that court (*Arthur* v. *Herrman*, 96 U. S., 141; *Arthur* v. *Fox*, 108 U. S., 125; *Herrman* v. *Arthur's Ex'rs*, 127 U. S., 363); and therefore, in opinions given in those cases, there is found no discussion of that clause. I shall therefore follow the construction of the similar clause which was approved in the *Butterfield* case. This particular case is then left to be determined on the form of protest; and inasmuch as that, in both its clauses, evidently insisted upon the classification of the article as one nonenumerated, it is not sufficiently specific to warrant a recovery. Verdict directed for defendant.

ARGUMENT.

I.

The collector's classification was presumptively correct (*Arthur* v. *Unkart*, 96 U. S., 118). As the bill of exceptions does not inform us what that classification was, it is necessary to inquire what clause, if any, can have been held by him to cover the articles. We find that the goat's hair and similitude clauses were applied to similar fabrics

in *Arthur* v. *Fox*, *supra*, and hence conclude that the collector's classification may properly have been made under these clauses, involving higher duties than 35 per cent.

In the absence of any proof rebutting the presumption of similarity thus arising from the collector's decision, there was no question for the jury (III, *infra*). For the similitude clause governs the clause relied upon in plaintiff's protest, as held in *Arthur* v. *Fox*, *supra*.

If, indeed, the goods were "manufactures of hair," the collector's classification was incorrect; not because the clauses relied upon by him were *not* applicable, but because other provisions were *more* applicable. The protest, however, is insufficient to raise this point (II, *infra*).

II.

The court correctly held that the protest is not sufficient to enable plaintiff to rely on the *Butterfield* case.

The protest is in a somewhat common form. Its objection to the duty as levied is made by stating that a different rate of duty is the proper rate. There is no general objection to the assessment in question as intrinsically improper. No such objection could in fact be made. The goods are clearly enough within the provisions relied upon by the collector, if there is not some other provision in the tariff law equally applicable and more specific. It was, therefore, necessary for the importer, in order to make out a specific protest, to state definitely in what clause he regarded his goods as being enumerated so as to take them out of the operation of the similitude clause.

The importer understood this requirement of the situation, and attempted to specify the correct clause. But the

specification which he made was unquestionably incorrect, if, as the court states and we here assume, the goods were similar to goat's hair goods, as in the *Fox* case. He omitted to mention the only clause upon which he could properly rely, and did not raise the correct point until the trial.

His contention is, therefore, unavailable under the statute as considered in *Davies* v. *Arthur* (96 U. S., 148), and the cases following that authority, which, as we shall endeavor to show, is the proper construction of the statute.

This action is a statutory one, and can be maintained only by complying with the statutory requirements. (*Cary* v. *Curtis*, 3 How., 236; *Lawrence* v. *Caswell*, 13 How., 488, 496; *Nichols* v. *United States*, 7 Wall., 122, 126; *Arnson* v. *Murphy*, 109 U. S., 238.)

The requirements of the Revised Statutes were as follows:

> § 2931. * * * The decision of the collector of customs * * * as to the rate and amount of duties to be paid * * * shall be final and conclusive against all persons interested therein, unless * * * the owner, importer, consignee, or agent of the merchandise * * * shall, within ten days after the ascertainment and liquidation of the duties, * * * give notice in writing to the collector on each entry, if dissatisfied with his decision, *setting forth therein, distinctly and specifically, the grounds of his objection thereto*, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom, etc.
>
> § 3011. [As amended by the act of February 27, 1877.] Any person who shall have made payment under protest and in order to obtain possession of

> merchandise imported for him, to any collector, * * * when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section 2931.

The decisions on the character of the protest thus required have been very numerous. We may here throw out of consideration decisions on protests relating to alleged errors in administrative practice, and confine ourselves to a review of the decisions relating to claims of erroneous classification for duty. It will be found that these decisions are very strict in one aspect, although liberal in another. They are strict in requiring the importer to point out his precise objection to the collector within ten days after the liquidation of his entry on pain of being forever barred. They are liberal as to mere mistakes of form, if the protest in some form calls attention to the precise objection made. Mere clerical errors are disregarded, nor is it necessary to specify the Treasury number of the paragraph under which the importer claims that his goods should be classified.

The principles are stated by Mr. Justice Clifford in *Davies* vs. *Arthur*, *supra*, at pages 151, 152, as follows:

> Protests of the kind must contain a distinct and clear specification of each substantive ground of objection to the payment of the duties. Technical precision is not required; but the objections must be so distinct and specific, as, when fairly construed, to

show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated. (*Burgess* v. *Converse*, 2 Curt., 223.)

Two objects, says Judge Curtis, were intended to be accomplished by the provision in the act of Congress requiring such a protest: 1. To apprise the collector of the objections entertained by the importer before it should be too late to remove them, if capable of being removed. 2. To hold the importer to the objections which he then contemplated, and on which he really acted, and prevent him, or others in his behalf, from seeking out defects in the proceedings, after the business should be closed, by the payment of the money into the Treasury. (*Warren* v. *Peaslee*, 2 Curt., 235; *Thomson* v. *Maxwell*, 2 Blatchf., 392.)

A moment's consideration is enough to show the great importance to the Government of these requirements. The moneys collected are paid into the Treasury. If, years afterwards (nine years in this case), the importer can come into court and call attention to some section that had been overlooked both by himself and by the collector, he would recover from the Government not only the excess of duty paid by him, but interest thereon from date of payment at the high rate of 6 per cent (which, in this case, would be 54 per cent). Moreover, it prevents the collector from applying the proper rule to other importations of the same kind, so that the Treasury calculations may, perhaps, be deranged to the extent of millions of dollars. It is presumable that the collector and the Sec-

retary of the Treasury were acting in perfect good faith and with reasonable diligence; and it is at least very probable that if the right paragraph was called to their attention they would reliquidate the entry accordingly. It is therefore reasonable that the importer be held to good faith and diligence, and not allowed long afterwards to secure a rerating which he does not ask at the time.

The leading case, *Davies* v. *Arthur*, is reported below at 13th Blatchford, 34, and the punctuation of the protest seems to be there a little more correctly given than in the Supreme Court report. The decision of this court in the case is reported at 96 U. S., 148. The importations were partly silk neckties. They were classified by the collector under section 8 of the tariff act of June 30, 1864, ch. 171, as silk scarfs, at 60 per cent ad valorem. The importer, in his protest, denied that they were scarfs and claimed that they—

> should only pay duty, being "articles worn by men, women, or children," etc., and "wearing apparel," under sect. 22, act of March 2, 1861, and sect. 13, act of July 14, 1862, at 35 per cent ad valorem.

At the trial it was admitted by both parties that both had been wrong, and that the goods were in fact subject to a duty of 50 per cent ad valorem, as manufactures of silk not otherwise provided for, under act of 1864 above cited. The principles and authorities relating to the form of protest were discussed at length by Mr. Justice Clifford, and his opinion closes with the following propositions:

> Three points were ruled by the circuit court: 1. That, unless the protest set forth distinctly and specifically the ground of the objection to the amount

claimed, it fails to meet the requirement of the act of Congress. 2. That the office of the protest is to point out to the officers of the customs the precise errors of fact or of law which render the exaction of the duty unauthorized. 3. That the plaintiffs are precluded from insisting that their importation was a manufacture of silk not otherwise provided for, and subject to a duty of 50 per cent instead of 60, when, by their protest, they allege it to be wearing apparel, etc., subject to a duty of 35 per cent.

Satisfactory reasons in support of these conclusions are given by the circuit judge, to which it will be sufficient to refer, without repetition. *Davies* v. *Arthur* (13 Blatch., 34); *Norcross* v. *Greeley* (1 Curt., 120).

Apply these principles to the case before the court, and it is clear that there is no error in the record.

Davies v. *Arthur* has been followed in the lower courts in the following reported cases among others: *Chung Yune* v. *Kelly* (8 Sawyer, 415); *In re Austin* (47 Fed. Rep., 873); *In re Collector of Customs* (55 Fed. Rep., 276). In all of these cases the correct duty was as high as the duty claimed by the importer in his protest. The later cases in this court, distinguishing *Davies* v. *Arthur*, do not restrict its scope.

In *Arthur* v. *Dodge* (101 U. S., 34) it is difficult to understand what objection can have been urged to the sufficiency of the protest. The court said that it fully met the requirements of the *Davies* Case.

In *Arthur* v. *Morgan* (112 U. S., 495), a clerical error was corrected in the protest, which, however, clearly showed, as the court said, "that the objection afterwards made at the trial was in the mind of the party and was

brought to the knowledge of the collector." The article imported in that case was a carriage, which was claimed in the protest to be "personal effects" used by the owner "over a year" before importation. The requirement as to a year's use prior to importation was one relating not to "personal effects" but to "household effects." The court held that the importer clearly meant "household" when she said "personal;" but the error was clerical and could not have misled the collector. The court accordingly sustained the importer's claim, on the ground that the carriage was "household effects," without considering whether or not it was also "personal effects."

In *Schell's Ex'rs* v. *Fauché* (138 U. S., 562, 567), the protest under the tariff act of 1867 was as follows:

> We hereby protest against the payment of a duty of 24 per cent, charged by you on worsted stuff goods, claiming that under existing laws said goods are only liable to a duty of 19 per cent as a manufacture of worsted.

The goods were mousselines de laine; the material of the goods was worsted. They were, therefore, properly described in the protest both as "worsted stuff goods" and as "manufactures of worsted." The Walker tariff of 1846 (9 Stat., 46) places "manufactures of worsted, or of which worsted shall be a component material, not otherwise provided for," in Schedule D. It made no specific provision relating to de laines. The tariff of 1857 (11 Stat., 193) transferred "manufactures composed wholly of cotton, which are bleached, printed, painted, or dyed, and de laines," to Schedule C. It provided that articles in Schedule C should pay 24 per cent, and articles

in Schedule D should pay 19 per cent. The objection made to the protest seems to have been a mere technicality. The protest stated with perfect clearness that the goods should have been assessed at 19 per cent as a "manufacture of worsted," and it was stipulated at the trial that this proposition was correct.

The latest case is *Heinze* v. *Arthur's Executors* (144 U. S., 28). The goods there in question were cotton and silk gloves, cotton chief value, made on frames and properly dutiable, under various statutory provisions construed in *Arthur* v. *Unkart* (96 U. S., 118), at 35 per cent ad valorem, less 10 per cent, as "gloves * * * made on frames, of whatever material composed, worn by men, women, and children, and not otherwise provided for." The collector made a clearly; legal rating at 60 per cent ad valorem, as "ready-made clothing of silk, or of which silk shall be a component material of chief value," or "silk * * * gloves." The protest was as follows:

> On an importation of the undersigned firm, per steamer *City of Brussels*, from Liverpool, duty paid January 14, 1874, containing partly cotton gloves mixed with silk, the appraisers of this port have levied a duty of 60 per cent ad valorem, although the article is only liable to a duty of 35 per cent less 10 per cent, being composed of cotton and silk, cotton chief part, the duty of 60 per cent being only legal where silk is the chief part.

The protest was objected to on the ground that it did not state that the gloves were made on frames. The court sustained the protest on the following ground:

> It was sufficient to state that the gloves were composed of cotton and silk, and that the cotton was the

> component material or part of chief value, and the silk was not the component material of chief value. The importers were bound only to state, as they did, that the duty of 60 per cent was illegal, and why it was illegal. * * * Under the ruling of this court in *Davies* v. *Arthur* (96 U. S., 148, 151), the objection set forth in the protest in this case, to the decision of the collector, was so distinct and specific as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated.

There are two main distinctions between the *Heinze* case and the *Davies* case: In the first place the importer in the *Heinze* case stated correctly the proper duty upon his goods and the reason why the duty claimed by him was proper and the duty levied improper. He did not recite in full the statutory provision under which he claimed, but he clearly enough indicated it, and the collector did not ask to have his protest made any more definite. Second, he did precisely, and with the most absolute definiteness, show why the collector's rating was improper. As the collector had rated the goods under a section which was absolutely inapplicable in any event, it was sufficient to point out and explain his error without informing him under what act or schedule he ought to have rated the goods, especially when no request to this effect was made.

In the *Davies* case, however, the importer made his objection by attempting to specify the provisions which were applicable to his case, and made a wrong specifica-

tion, thus misleading the collector. Specifying an objection, although specification be unnecessary, restricts the scope of the objection by a quasi estoppel. The principle is familiar in its application to objections to evidence at nisi prius. (*Evanston* vs. *Gunn*, 99 U. S., 660; *Belk* vs. *Meagher*, 104 U. S., 279, 289.)

In the present case there is the still further distinction that the paragraph relied on by the collector was actually applicable to the case in question. The only tenable objection to its application by the collector can be that another section was more specifically applicable. The objection could, therefore, only be properly stated by pointing out the governing provision. This the importer failed to do, and, therefore, the court properly ruled on the trial that he had lost its benefit.

III.

Plaintiffs in error here, however, abandon the *Butterfield* case, and make the following argument: (1) There is no proof that the hair is the main element of *value* in this fabric. *Non constat* that the relative *values* accord with the relative *weights*. Hence, it not appearing that the fabric is substantially hair in value, the *Butterfield* case does not apply. (2) There is no evidence of similitude, and hence the similitude clause does not apply. (3) Hence we are left to rely alone on the component-material clause; which conforms to the protest.

It is not disputed that the *Butterfield* case applies if the goods are 80% hair in value; or that, if this be not so, the *Fox* case applies if there is any evidence of similitude.

(1) *Relative values—Butterfield Case.*—The burden is on the plaintiff in error to impugn the position of the trial court. So far as the evidence does not fully appear, all intendments are in support of the judgment, especially as the bill does not purport to contain all the evidence (*Carroll* v. *Peake*, 1 Pet., 18; *Russell* v. *Ely*, 2 Black, 575, 580). Either the bill of exceptions omits testimony on the subject of value, or the court assumed that the value varies with the weight. What indication is there that the latter assumption is incorrect? The trial seems by the opinion of the court to have been conducted by both parties on the theory that these goods were of the same grade as those in the *Butterfield* case. Moreover, it is really the weight rather than the value that characterizes the goods.

2. *Similitude—Fox Case.* The collector found a similitude to low-grade goats' hair and cotton goods, if the report in the Federal Reporter is correct. The bill of exceptions fails to state just what rating he gave or why he gave it. The presumption at the trial was that the collector was right (*Arthur* v. *Unkart*, 96 U. S., 118). The presumption is here, as above pointed out, that the trial judge was right. The similitude of calf hair to goats' hair in material is clear, and has been recognized by this court in the *Fox* case (108 U. S., at p. 128). There was no question to go to the jury in the case at bar, because no evidence was introduced to rebut the presumption of similarity arising from the collector's ruling. When there is no question of fact, verdicts can be directed upon the similitude clause as upon any other (*Fisk* v. *Arthur*, 103 U. S., 431). In that case a verdict was directed, and upheld here on the

authority of *Stuart* v. *Maxwell* (16 How., 150), the leading case on the similitude clause. A similar direction was held erroneous in *Herrman* v. *Arthur's Exrs.* (127 U. S., 363, 369–370), because there was evidence rebutting the presumption of similarity arising from the collector's decision and also evidence showing that too high a rating had been given, that the similitude was to goods costing less than 40 cents a pound, instead of more than 80 cents a pound as found by the collector. This raised a question of fact for a jury.

But plaintiffs' whole argument on this head is based on the erroneous assumption that the bill of exceptions shows the collector to have charged a higher specific rate than 20 cents.

It is respectfully submitted that the judgment should be affirmed.

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